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2 | UNITED STATES BANKRUPTCY COURT

3 | SOUTHERN DISTRICT OF NEW YORK

4 Case No. 09-50026-reg

6 | In the Matter of:

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8 MOTORS LIQUIDATION COMPANY, et al.

9 f/k/a General Motors Corporation, et al.,

10

11 | Debtors.

12

14 | Page

15 United States Bank

16 One Bowling Green

17

18

19 October

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21

22

23 B E F O R E:

24 HON. ROBERT E. GERBER

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2 HEARING re Motion of General Motors LLC Pursuant to 11 U.S.C.
3 §§ 105 and 363 to Enforce 363 Sale Order and Approved Deferred
4 Termination (Wind-Down) Agreement

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1 P R O C E E D I N G S

2 THE CLERK: All rise.

3 THE COURT: Good morning -- or afternoon. Have
4 seats, please. All right. GM. Motors Liquidation Company.
5 Rally Motors. Mr. Lederman, do we have some preliminary
6 matters that I had become unaware of?

7 MR. LEDERMAN: No, Your Honor, we don't. The only
8 matter before you is a matter that you just introduced. So I
9 was just going to introduce the parties and turn over the
10 lectern to them.

11 THE COURT: All right. Well, I know Mr. Steinberg
12 and Mr. Snyder. Why don't the remainder of you folks introduce
13 yourselves.

14 MR. DAVIDSON: Scott Davidson from King & Spalding --

15 THE COURT: All right.

16 MR. DAVIDSON: -- for New GM.

17 MR. OXFORD (TELEPHONICALLY): Greg Oxford, Isaac
18 Clouse --

19 MR. BLATT: Steven Blatt from Bellavia --

20 THE COURT: Just a minute, please. First, I need the
21 folks in the courtroom to introduce themselves.

22 MR. OXFORD: Okay, Your Honor.

23 THE COURT: And then if people are on the phone, I'm
24 going to have to ask that they defer to people in the courtroom
25 unless people in the courtroom hand off to them.

1 MR. BLATT: Steve --

2 THE COURT: All right. Just a minute, please,
3 gentlemen.

4 MR. BLATT: Yes, Your Honor.

5 THE COURT: All right. With Mr. Snyder?

6 MR. BLATT: Yes.

7 MR. SNYDER: Yes, Your Honor. I'm sorry. Go ahead.

8 MR. BLATT: Steven Blatt, Bellavia Gentile, 200 Old
9 Country Road, Mineola, New York, on behalf of Rally Auto Group.

10 THE COURT: Right, Mr. Blatt. Okay.

11 THE COURT: Now, is there a gentleman on the phone
12 who wanted to introduce himself?

13 MR. OXFORD: Yes, Your Honor. It's Greg Oxford,
14 Isaac Clouse Crose & Oxford also appearing with Mr. Steinberg
15 on behalf of General Motors LLC.

16 THE COURT: All right, Mr. Oxford. Okay. Gentlemen,
17 make your presentations as you see fit. But I'm going to need
18 you to address the following needs and concerns. But first,
19 let me lay on my frustration with you guys, both sides. I
20 cannot, for the life of me, understand, Mr. Snyder and Mr.
21 Blatt, why you can't follow the requirements of my case
22 management orders and give me a table of cases and table of
23 authorities as those rules require in baby talk. When I'm
24 trying to compare the two submissions and see what you guys
25 said about a particular case or, for that matter, how you

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1 organized your arguments, that is a source of incredible
2 difficulty and frustration for me. And, Mr. Steinberg and Mr.
3 Oxford -- Mr. Oxford, I think you at least have been in this
4 case before. How many times have I said that I don't want to
5 use -- see the word "passum" especially when it refers to the
6 most important case in your whole brief on a lot of these
7 issues? I'm not expecting a response now. You can address it
8 when it's your turn.

9 Gentlemen -- Mr. Snyder and Mr. Blatt, if you want to
10 make your subject matter jurisdictions, you can, but it doesn't
11 seem to me that this is about subject matter jurisdiction in
12 any way, shape or form. Frankly, I think you missed the boat
13 when you were talking about related-to jurisdiction. It seems
14 to me that this is a poster child for arising-in jurisdiction
15 and the principle that bankruptcy judges have the authority to
16 enforce their own orders. And when an agreement says that the
17 bankruptcy court will have exclusive jurisdiction to deal with
18 a particular matter and then the order implements that, I have
19 some trouble seeing how it can be to the contrary. If you
20 nevertheless want to continue to the contrary, you got to help
21 me with Petrie Retail and Millenium Seacarriers on those
22 points.

23 Now, I sense that both sides agree that there is no
24 right of judicial review under the Dealer Arbitration Act and
25 that the Federal Arbitration Act applies only to contractual

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1 agreements to arbitrate. So therefore, we're on a little bit
2 of -- or totally implied remedies if and to the extent they
3 exist. Now, Mr. Steinberg, I want to see whether your argument
4 proves too much. And you can help me with that if I posit to
5 you a situation where the arbitrator is taking bribes or he's
6 taking an ex parte communication because my belly would tell me
7 that even if there weren't an expressed right of judicial
8 review in that situation that Rally Motors, if it were on the
9 losing end of that type of situation and, of course, if it came
10 to me, could come and say, Judge, I need relief from that kind
11 of thing. But, of course, Mr. Snyder and Mr. Blatt, that isn't
12 what you're alleging here. In essence, you're alleging that
13 the arbitrator made an error of law. And you haven't shown me
14 any case in which the arbitrator was told that he had to deal
15 with these franchise agreements double or nothing. And it
16 strikes me as a garden variety claim of legal error. So help
17 me if I'm wrong on that.

18 Now, I don't know how many times I and the other
19 bankruptcy judges in this district have had 363 orders and
20 confirmation orders provide for continuing jurisdiction
21 typically to follow up on the implementation of things that
22 were in the sale order and in the plan or agreements that were
23 provided under either. Counterparties come into the court all
24 the time putting their money on the line to get benefits by
25 dealing with the bankruptcy court. And that's an important

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1 reason, as at least one of the cases that was quoted to me
2 says, why we have provisions of this character. And I need
3 your help in understanding why I should say "Never mind" to
4 provisions of that type. But if there is authority for some
5 kind of implied judicial review that I, in contrast to a
6 district judge exercising diversity jurisdiction, could issue,
7 or even if it were deemed to be 1331 federal question
8 jurisdiction -- though I don't see the provision of the U.S.C.
9 under which the federal right arises. I mean, I see why you
10 could compel GM to arbitrate but New GM didn't quarrel with
11 your right to arbitrate that I need help on that.

12 So, Mr. Snyder, will it be you or Mr. Blatt?

13 MR. SNYDER: It'll be me, Your Honor.

14 THE COURT: Okay.

15 (Pause)

16 MR. SNYDER: Your Honor, as I think the analogy for
17 our purposes or the point where we start is the AAA commercial
18 rules. And I focus on those, Your Honor, only because, as the
19 Court pointed out, I don't think anyone disputes that when both
20 parties sat down to the arbitration that the commercial rules
21 apply. Now, GM states that it objected to the use of the
22 commercial rules. But be that as it may, the scheduling order,
23 in particular, paragraph 1, which is annexed to our objection
24 as Exhibit F, specifically states that the commercial rules
25 apply. And one of those rules, Your Honor, is 48(c) which we

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1 relied on extensively in our papers but it states, and I
2 quote -- it's short: "Parties to an arbitration under this
3 rule shall be deemed to have consented. A judgment upon the
4 arbitration award may be entered into any federal, state or
5 court of competent jurisdiction." Now it doesn't say they have
6 to agree. It says that they've deemed to have consented. And
7 so our argument is, Your Honor, that if the AAA commercial
8 rules apply and GM is deemed to have consented then, naturally,
9 there is a -- the arbitration award is final and binding and
10 there has to be a right of judicial review under the terms of
11 48(c). Now we cited to the Idea Nuova case for the proposition
12 that although that was a contract case, where the contract is
13 silent as to whether the rights of judicial review apply, the
14 Courts will impute 48(c) not because the parties agreed to
15 arbitrate, Your Honor, but because by going forward with the
16 arbitration, because the commercial rules themselves apply,
17 they're deemed to have consented to both the arbitration and
18 the entry of a final judgment. And, Your Honor, that's based
19 solely on facts that are not in dispute.

20 THE COURT: Mr. Oxford, do you want to mute your
21 phone, please?

22 MR. OXFORD: I'm not sure I know how to do that. We
23 could --

24 THE COURT: All right. CourtCall, mute them. Go
25 ahead, Mr. Snyder.

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1 MR. OXFORD: I didn't hear you, Your Honor. I'm
2 sorry.

3 THE COURT: I'm telling CourtCall to mute you, Mr.
4 Oxford. Go ahead, Mr. Snyder.

5 MR. SNYDER: Thank you, Your Honor. Now we agree,
6 Your Honor, as GM has pointed out that the Dealer Arbitration
7 Act is silent as to judicial review. But we contend in
8 addition to the AAA commercial rules giving the federal court
9 subject matter jurisdiction that, as Your Honor pointed out,
10 that if a federal question presents itself under 28 U.S.C. 1331
11 then the California district court can rely on that federal
12 question to possess subject matter jurisdiction. And that
13 federal question is presented here, to wit. Is the removal of
14 a Chevrolet brand the granting of a "covered dealership" as
15 that term is defined under 747(a) and (d)? It's stated
16 specifically, Your Honor, in Rally's statement. Does the
17 removal of a Chevrolet brand constitute a "covered dealership"?
18 So we have a federal statute that Rally is asking a federal
19 court to interpret and we have the Vaden case which I cite to
20 at -- and -- 129 S. Ct. 1262. In that case, the Supreme Court
21 held that a federal court could look through the arbitration,
22 Your Honor, to determine whether the controversy in question
23 arises under the federal law so that the court has federal
24 question jurisdiction. That's all we're asking the federal
25 court to do. Interpret a federal statute on a federal

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1 question.

2 And in addition, Your Honor, we believe the federal
3 court has jurisdiction for the issue that Your Honor has raised
4 and is the most troubling, at least to me, that there is no
5 right to judicial review. GM doesn't cite to any federal
6 statute, while may be silent or limited, that did not allow for
7 judicial review. Which goes right to the due process argument
8 and the constitutionality of the statute itself.

9 Your Honor, the arbitrator didn't have to take
10 bribes. Let's just say we end this hearing and regardless of
11 what happens GM says, I'm not reinstating you. I don't care
12 what Judge Gerber says or anyone else says.

13 THE COURT: Well, isn't that the easier case because
14 wouldn't you, Mr. Snyder, be able to come back to me in about
15 ten minutes and say that New GM isn't complying with the
16 arbitration award? And to the extent that I understood your
17 48(c) argument, the language is "deemed to have consented to
18 enforcement". And if you say -- let's take what I understand
19 to be the case. You won three-quarters of -- or your client
20 won three-quarters of the arbitration before the arbitrator.
21 And suppose GM stiffens you on those three-quarters where you
22 prevailed -- your client prevailed. I would have thought --
23 and maybe Mr. Steinberg should be heard on this because if he
24 contends to the contrary, I guess I should know it. But I
25 would have thought that you could come back to me and say make

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1 GM -- New GM comply with the arbitrator's award. But you're
2 not trying to enforce the arbitrator's award. You're trying to
3 attack it. You're trying to attack the one-quarter of it you
4 don't like.

5 MR. SNYDER: Your Honor, we're trying to say that if
6 there is judicial review of a statute that does not allow for
7 judicial review that the constitutionality of the statute, the
8 due process argument is the district court possesses
9 jurisdiction to that. There's a crucial difference, Your Honor
10 -- and to me, this is the crux of our argument. Putting the
11 core related and Petrie aside for the moment, whether this
12 Court has jurisdiction or not is to me not the issue. The
13 issue is whether the California court has jurisdiction. What
14 GM is saying is this Court has sole and exclusive jurisdiction.
15 That means of the 600 dealers that had their claims arbitrated
16 with GM, if they are unhappy with a portion of the award then
17 all 600 nondebtors with New GM, a nondebtor, that this Court
18 has sole and exclusive jurisdiction to determine under the
19 Federal Arbitration Act what a covered dealership is. And I'm
20 suggesting that the California district court, whether as a
21 federal question or for constitutionality purposes, might also
22 have that jurisdiction because it can't be that as a result of
23 the wind-down agreements, when the Dealer Arbitration Act was
24 passed that the Court was willing to say we're going to pass
25 the Dealer Arbitration Act to give you dealers another bite at

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1 the apple. But you have to go back to the bankruptcy court if
2 you want it enforced. Now maybe this Court does have related-
3 to jurisdiction but it couldn't be, Your Honor, that there is
4 no right of judicial review and Congress' intent was that
5 everybody has to come back here. And that's --

6 THE COURT: I don't want to interpret you, Mr.
7 Snyder, but it wasn't related-to jurisdiction that I think is
8 in play here. I think it's arising-in jurisdiction, the second
9 of the three prongs under 1334.

10 MR. SNYDER: Understood, Your Honor. And again, even
11 if this Court has arising-to jurisdiction, that is not what
12 we're arguing. They are arguing -- and remember, Your Honor,
13 the motion seeks to compel us to withdraw a lawsuit in federal
14 court because the district court does not have jurisdiction.
15 And I think for the three reasons I've stated, the plain
16 language of 48(c), the introduction of a federal question and
17 the constitutionality of a law that does not allow for judicial
18 review, gives the California district court jurisdiction. It's
19 not to say that this Court doesn't have jurisdiction but we
20 didn't start in this court. We started in the federal court in
21 California. They filed an answer. They didn't move to
22 dismiss. And then three days later, they filed the motion
23 here. Not by order to show cause because they were so
24 concerned about the California's court jurisdiction but by
25 regular motion. The -- we, in deference to this Court, didn't

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1 go into the California court to seek a stay. We told them that
2 we would come here and explain to this Court why the Court, the
3 California court, has federal court jurisdiction. They don't
4 reply to our arguments about Vaden and the ability of a federal
5 court to go through -- look through an arbitration. The
6 decision is powerful, Your Honor, to the extent it allows you
7 to look through the arbitration and see if a federal question
8 is presented. That's our issue, that federal questions are
9 presented, constitutionality presented. Normally not an issue
10 but in a case where a statute is silent as to the right of
11 judicial review, the implication or the logical extension of
12 their argument is that everybody has to come back here. And it
13 is submitted, Your Honor, that that's not what Congress
14 intended by leaving the statute silent. We believe what they
15 intended is that the arbitration rules will allow the dealer,
16 the aggrieved dealer, to go into a court of competent
17 jurisdiction to get the relief they seek.

18 And although the judicial estoppel argument has gone
19 up and back, Your Honor, in their complaint, in paragraph 3 in
20 the Santa Monica case, they don't just rely on diversity when
21 they seek to compel Santa Monica to execute the settlement
22 agreement. They rely on 28 U.S.C. 1331 to get the district
23 court's attention. They rely on the Dealer Arbitration Act to
24 get the Court to execute -- to restrain Santa Monica. Then
25 they come here and say this Court has sole and exclusive

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1 jurisdiction with respect to matters in the Dealer Arbitration
2 Act. They didn't come here, Your Honor, when Santa Monica
3 sought to exercise jurisdiction and refused to sign that
4 settlement agreement. They went to the California district
5 court. And so, to argue that sole and exclusive jurisdiction
6 sits here but to rely on federal jurisdiction not just
7 diversity, 28 U.S.C. 1331 jurisdiction in California, to me,
8 rises to the level of judicial estop.

9 The last argument, Your Honor, which was the first
10 one you raised, is the applicability of Petrie and the ability
11 of the Court to enforce its orders. And there's no doubt that
12 buyers have expectations and they want this Court to enforce
13 them and they have a right to come in here and seek that. But
14 they have -- every provision of the wind-down agreement that
15 they have pointed to, other than the covenant to sue, is not
16 being implicated. We were able to sue, commence an
17 arbitration, because the Dealer Arbitration Act allowed us to.
18 They actually state in their papers that us going into
19 California district court violated the covenant to sue. Well,
20 how can that be? How can that be that the statute allows us to
21 go to Califor -- and commence an arbitration but doesn't allow
22 it to enforce it anywhere?

23 The wind-down agreement is still the wind-down
24 agreement. The dealer, Rally, and the other 600 dealers still
25 have certain obligations that they need to fulfill by October

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1 31st. But the covenant not to sue is not one of them because
2 the statute that was codified in December 2009 gave the dealer
3 certain rights. And they are limited rights. They're not
4 happy with the outcome. Rally believes that the definition of
5 covered dealer was inappropriately misinterpreted by the
6 arbitrator. There is nothing in the wind-down agreement or the
7 363 order, Your Honor, that suggests they would have to come
8 back here for that.

9 Now, it's unfortunate that the statute is silent.
10 But issues of due process and federal question as well as the
11 AAA rules allow Rally to go into court in California to redress
12 those arguments. That's our position. Again, we're not
13 suggesting or it's minimally relevant that this Court has
14 jurisdiction. Our question is does the California court have
15 jurisdiction. GM thought it did under 28 U.S.C. 1331. So do
16 we. And that's the reason we object to them saying this Court
17 has sole and exclusive jurisdiction under the wind-down
18 agreements as if the Dealer Arbitration Act didn't exist.

19 THE COURT: Well, you hit on something that I'm glad
20 you did, Mr. Snyder, because I want both you and Mr. Steinberg
21 to address it when it's your respective turns. And, of course,
22 it's your turn now. I would have thought that the Dealer
23 Arbitration Act trumps my order and the wind-down agreements to
24 the extent they're inconsistent. But that the duty of any
25 Court is to try to construe them together to achieve harmony

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1 between them so there is the minimal clashing between the two
2 and that where, of course, the later Dealer Arbitration Act
3 speaks to something, it controls over my order but only to that
4 extent. Do you think I'm off base from that?

5 MR. SNYDER: I do not, Your Honor.

6 THE COURT: All right. Keep going.

7 MR. SNYDER: And, Your Honor, I or Rally do not see
8 the ability to confirm a judgment, as that term is defined in
9 48(c), or if the district court should allow, modify or vacate
10 the judgment under the commercial arbitration rules as being
11 anything other than an extension of the arbitration which was
12 codified in the Dealer Arbitration Act. It isn't a violation
13 of the covenant not to sue under the wind-down agreements
14 because under the wind-down agreements in July 2009, this was
15 not a sparkle in anybody's eye. No one knew what Congress
16 would end up doing six months later. They're looking to
17 prohibit us from doing something that wasn't even contemplated
18 at the time Your Honor entered that order. This came six
19 months later. And so the rules changed partially. I'm not
20 suggesting the wind-down agreements are -- they say aggregated
21 -- none of that. But the covenant to sue was. And they were
22 allowed to commence arbitrations against New GM in order to get
23 rights back, thumbs up or thumbs down.

24 THE COURT: Do you think it covers all covenants or
25 all suits or can you harmonize them by saying that if you win

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1 in the arbitrations that Congress has now given you, of course
2 you have the right to enforce that if your opponent, which in
3 this case is New GM, is so dumb as to try to welsch on the
4 arbitrator's ruling. But that's really how they -- separate
5 provisions are best read together.

6 MR. SNYDER: Your Honor, there's a reason why -- you
7 call it dumb, but there's a reason why the fifty states and
8 every federal statute except this one that I've seen has the
9 right of judicial review. It's because if there is no
10 enforcement of a final or binding arbitration then the other
11 side could say, ha, forget it, I'm not doing anything 'cause
12 you have no place to go.

13 THE COURT: Again, I remain troubled by the
14 distinction between enforcing the award which my tentative,
15 California style subject to your opponent's right to be heard,
16 is that if New GM hadn't complied with the arbitrator's award,
17 I would make it, and to attack the arbitrator's award which
18 invokes separate policy considerations.

19 MR. SNYDER: Well, Your Honor, I would say that it
20 seems as if the rules which required findings of fact were set
21 up for judicial review. If the arbitrator had simply said,
22 Your Honor, we're ruling against Rally because I know Larry
23 Mayle, the president, and I don't like him, where could we go?
24 If the Court is suggesting if that was the ruling that we could
25 go into this court to overturn or vacate an arbitration for

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1 manifest disregard of fact and law out of an arbitration coming
2 out of the Dealer Arbitration Act, I don't see it. I see it as
3 being a federal question that allows judicial review for
4 manifest disregard of facts and law through a federal court.
5 That's what the Supreme Court said in Vaden, that you can look
6 through the arbitration to see if a federal question exists.
7 GM doesn't even cite to Vaden in their reply brief. But that
8 is uniquely a federal question. Is Chevy a covered brand as
9 that term is defined under 747(a) and (d)? What could be more
10 of a federal question than citing to the statute itself. This
11 is not an abstract referral, Your Honor, where Rally was trying
12 to get around state jurisdiction. This is questioning the
13 words of a federal statute. And Rally would have never thought
14 to come to this court, Your Honor, as a result of an
15 arbitration to enforce or to ask this Court to make findings of
16 fact as to whether Chevy is a covered dealership as that term
17 is defined under 747(a) because although this Court might have
18 jurisdiction, the California court certainly has jurisdiction.

19 And, Your Honor, that's what we see as the
20 difference. When I speak about losing or diminishing
21 jurisdiction in the sales process, I'm not suggesting that
22 buyers can't come back to get the benefit of their bargain.
23 But this was not the benefit of anybody's bargain because the
24 Dealer Arbitration Act wasn't even in existence at the time.
25 They couldn't have said we want this statute because we want no

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1 judicial review from the dealers. What are you talking about?
2 There's no right to review anyway. There's a covenant to not
3 sue. The Dealer Arbitration Act hadn't even been introduced
4 yet. So they can't say they didn't get their expectation
5 'cause there was no expectation. This was six months later.
6 So I don't see this as an enforcement of an order 'cause there
7 was no expectation that they would have that right.

8 (Pause)

9 THE COURT: Okay. Mr. Snyder, I'm going to give you
10 a chance to reply but is this a good time to hear from Mr.
11 Steinberg?

12 MR. SNYDER: Yes, Your Honor. Thank you.

13 THE COURT: Thank you.

14 (Pause)

15 MR. STEINBERG: Good afternoon, Your Honor. I think
16 Your Honor's questions were very incisive and I will try to
17 answer them as best as I can and to try to point out why I
18 think my colleague has not fully answered Your Honor's inquiry.
19 I think Your Honor is correct that the real issue here is there
20 was a wind-down agreement. Your Honor approved the wind-down
21 agreement that was part of the sale process. And then
22 subsequently, Congress acted under the Dealer Arbitration Act.
23 So how do you mesh what you had done versus the later
24 congressional statute?

25 And I think it's important to distinguish what does

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1 the Dealer Arbitration Act do and what it specifically did not
2 do. And the thing that it did, and I think my colleague has
3 agreed with this, is it provided dealers who either signed the
4 wind-down agreements or had their dealership agreements
5 rejected in either the Chrysler or General Motors cases a new
6 right created by a federal statute to be reinstated to the
7 dealer network of the debtor or the purchaser of the debtor's
8 assets. And in order to avail themselves of that right, they
9 had to file timely notices in accordance with the Dealer
10 Arbitration Act for binding arbitration. And I think my
11 colleague was correct. It was either up or down. Either
12 you're reinstated or you're not reinstated. And the Dealer
13 Arbitration Act told arbitrators they had seven factors,
14 nonexclusive, to take a look at for purposes of making that
15 determination. And there was specific and very, very tight
16 deadlines that were put in for the arbitration. You had to act
17 to ask for arbitration within forty days. You had six months
18 to complete the arbitration. The arbitrator had seven days to
19 make its ruling and that everything had to be done by July 14th
20 because the legislative intent of the statute which was to try
21 to create what Congress thought was a better balance between
22 the rights of dealers and the rights of the manufacturers, the
23 legislative intent was we need to have a streamlined process
24 that would not otherwise get bogged down with discovery or
25 litigation. We both quote -- at least our reply quotes from

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1 the legislative history to the statute which is fairly sparse.
2 But the legislative history refers to the need to have
3 something streamlined and quick and the statute does not
4 provide for judicial review unlike the Federal Arbitration Act
5 in Section 9, 10, 11 and 12. There are specific provisions
6 which talk about what a Court can do or not do in connection
7 with something that is governed by the FAA. This clearly is
8 not governed by the FAA. The FAA governs agreements where the
9 parties had agreed to arbitrate. This was not one of those
10 situations. This was a case where Congress had imposed the
11 obligation or the right for the dealer to seek arbitration
12 under specific circumstances but it wasn't a contractual
13 obligation that the parties had bargained for. So the FAA,
14 which is leadered (sic), the cases relating to the FAA, the
15 judicial review relating to an FAA, which my adversary recites
16 in his papers, they really have no relevance here. And I think
17 Your Honor was right. There is no judicial review. And that
18 was, I think, intentional. And I think my adversary says where
19 is it that you can never get judicial review? You know,
20 Congress passes a statute not -- imposing a new right and then
21 says that's -- we'll have a procedure to implement that statute
22 and that's it. And there's no more judicial review.

23 THE COURT: Well, pause, Mr. Steinberg, because I'm
24 wondering if that proves too much. Suppose the arbitrator's
25 taking bribes. And suppose the forum is this court and the

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1 dealer's been victimized by the arbitrator taking bribes.

2 You're telling me that I can't look at that?

3 MR. STEINBERG: I'm not sure if the right remedy
4 would have been to go to the AAA and say that there was an
5 invalid arbitration and seek the remedy there to invalidate the
6 results of the arbitration. But --

7 THE COURT: So you're going to take that and -- bring
8 it down and give it to the marshals and then you can return to
9 the courtroom.

10 MR. STEINBERG: But I will say, Your Honor, that the
11 hypothetical that you posed which is that if there was a
12 violation of what Congress had enacted because they had bribed
13 the arbiter of the resolution, it would seem to me that there
14 needs to be some kind of review. And maybe it would be Your
15 Honor who has the review. I'm not sure whether it would be the
16 AAA that would review it. But it would seem to me in a bribe
17 circumstance that that would be the case.

18 But I think critical for what my adversary has argued
19 which is that he's raised the potential for the
20 constitutionality of the Dealer Arbitration Act because there
21 is no judicial review, I don't know where that argument goes
22 for him because the Dealer Arbitration Act was a right given to
23 the dealers to potentially seek reinstatement. If you declare
24 the statute unconstitutional then they don't have that right.
25 If he's asking you to put in to the statute that which doesn't

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1 exist which is to, in effect, write the judicial review section
2 when Congress didn't write it, I don't think Your Honor has the
3 ability to do that.

4 And I don't think -- you know, they spend ten pages
5 of their brief saying how we didn't comply with provisions that
6 is the judicial standard under the Federal Arbitration Act.
7 And I would say to Your Honor that that's irrelevant because
8 that's not -- there is no standard of judicial review. And you
9 can't pick something from another statute and say that's what
10 I'm going to use here in order to make it constitutional.

11 Now, there is situations where Congress has given a
12 right to a party and there is no judicial review. We cited in
13 our papers the Switchmen case which was actually quoted in
14 Thomas. And we specifically highlighted the language which
15 said that "A review by the federal district court of the
16 board's determination is not necessary to preserve or protect
17 that right." Congress, for its reasons on its own, decided
18 upon the protection of the right which it created. And if you
19 look at Thomas itself, they talked about the concept of where
20 Congress has written legislation where it asked an agency to
21 make a decision. And the issue was if the agency did something
22 wrong, can it get judicial review. And there are certain
23 statutes that provide that there is no judicial review. So the
24 Thomas case when it was written referred to Medicare
25 reimbursement and said that an agency's review relating to

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1 Medicare reimbursement is not subject to judicial review.

2 So --

3 THE COURT: And Switchmen dealt with the Railway
4 Labor Act?

5 MR. STEINBERG: Yes.

6 THE COURT: And it was at least Thomas that was the
7 use of your "passum" if I recall.

8 MR. STEINBERG: Yes. And I apologize for that, Your
9 Honor.

10 So we have a situation here where there was a
11 legislative reason why things were done on a streamlined basis.
12 There is no language that talks about judicial review and there
13 is no issue I believe relating to constitutionality. But if it
14 is, I don't think it gets them anywhere. And it was nice that
15 they made this a central part of their oral argument when it
16 was relegated to a footnote in their brief which -- without any
17 real challenge other than just a throw-away that they question
18 whether it could be constitutional if there's no judicial
19 review.

20 Your Honor --

21 THE COURT: At least it got your attention enough for
22 you to cover it from pages 8 through 10 of your reply.

23 MR. STEINBERG: Yes, Your Honor, because I did think
24 it was an important issue and that Your Honor would want the
25 benefit of some briefing. But I did not think that that was

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1 the center of the argument.

2 Similarly, you'll notice how their argument is
3 morphed because their papers said Your Honor didn't have
4 jurisdiction, didn't have core jurisdiction, didn't have
5 related jurisdiction, asked you to defer to the public policy
6 of the Federal Arbitration Act, to defer to an arbitration when
7 they weren't prepared to necessarily defer to arbitration. And
8 now they, today, said well, we really didn't say you didn't say
9 you didn't have jurisdiction. You just don't have exclusive
10 jurisdiction. We think it may be concurrent jurisdiction. So
11 they did move as well on that.

12 But I think, Your Honor, that the reason why you do
13 have exclusive jurisdiction and the reason why the wind-down
14 agreement is implicating is because there is no judicial review
15 of what the arbitrator did. If there is no judicial review --
16 I think everybody agrees that the statute doesn't provide for
17 it explicitly. If there isn't then what's left? Because the
18 other thing that was critical as to the interplay between the
19 Dealer Arbitration Act and the wind-down agreement, the other
20 thing that's critical is that the Dealer Arbitration Act didn't
21 abrogate totally the wind-down agreement. I think my
22 colleague, my adversary, has agreed that it didn't totally
23 abrogate it. There are specific provisions that survive. And
24 so, that if you have an arbitration which has been completed
25 because all the arbitrations had to be completed by July 14th,

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1 and that's it then what's left on the areas where there was no
2 reinstatement, the thumbs down for the Chevrolet dealership,
3 you're back to being governed by the wind-down agreement. The
4 wind-down agreement provided that you couldn't sue New General
5 Motors. That still applies. There (sic) was abrogated solely
6 to the extent that the Dealer Arbitration Act allowed for this
7 binding arbitration remedy to be afforded to dealers who
8 availed themselves of the opportunity to seek arbitration
9 within forty days of the enactment of the Act. Otherwise, the
10 wind-down agreement stayed in effect. And the wind-down
11 agreement stayed in effect now for purposes for this entire
12 period of time that the Rally dealership was not entitled to
13 buy New General Motors vehicles because the wind-down provision
14 for that still stayed in effect.

15 THE COURT: Mr. Steinberg, do you agree that if New
16 GM hadn't complied with the arbitrator's award on the three
17 brands for which the arbitrator ruled in Rally's favor that
18 Rally could have come back here to enforce it with or without
19 the no-sue clause?

20 MR. STEINBERG: Yes.

21 THE COURT: All right.

22 MR. STEINBERG: Yes. I agree with that because
23 there, the provision, I believe, is ancillary to the
24 arbitration decision. They're looking to implement and enforce
25 the arbitration decision. And I think that if it wasn't being

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1 done since the arbitration is over, they do need to have some
2 kind of remedy. And they should be able to come back to this
3 Court. But I do think it's this Court because I do think that
4 part and parcel of the reason why there was exclusive
5 jurisdiction language in the sale order, exclusive jurisdiction
6 in the wind-down agreement that everybody who signed the wind-
7 down agreement signed was that New General Motors had bargained
8 for as part of the sale process -- had bargained for one forum,
9 this Court who had approved the transaction, to handle anything
10 relating to an enforcement or dispute relating to these
11 agreements. And to take it more broadly, to handle anything
12 that related to, in effect, the assignment and the continuation
13 of the dealership network from Old GM to New GM. And I think
14 that that was what New GM had bargained for here. And I think
15 Rally understood that because they not only were passive on the
16 entry of the sale order but in the wind-down agreement they
17 specifically recognized the exclusive jurisdiction. And that
18 didn't change. That didn't change. That's what New GM had
19 bargained for.

20 The issue, Your Honor, with regard to judicial
21 estoppel I think could be easily dealt with by the fact that in
22 the case where New General Motors went to a court, it was to
23 enforce a settlement agreement. The Dealer Arbitration Act
24 specifically says that if you're going to settle then there is
25 no arbitration and that the arbitrator has nothing to do. So

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1 when parties settle, they take themselves out of the Dealer
2 Arbitration Act totally based on the expressed language of the
3 statute. Then if someone --

4 THE COURT: Why didn't New GM come to me to enforce
5 that order?

6 MR. STEINBERG: We could have, for sure, Your Honor.

7 THE COURT: I'm sorry?

8 MR. STEINBERG: We could have, for sure, done that.

9 Your Honor, the issue with regard to Rule 48(c) of
10 the Commercial Arbitration Rules, we did indicate that we
11 weren't fully adopting the Commercial Arbitration Rules. The
12 Commercial Arbitration Rule, Rule 48(c), is for purposes of
13 seeking enforcement of an arbitration award and they are not
14 seeking enforcement of an arbitration award. And the AAA rules
15 itself say that the rules will be applied only to the extent
16 that it's not inconsistent with the Dealer Arbitration Act.
17 And we believe to try to, in effect, implicitly put in a
18 judicial review concept through a rule that says that you can
19 move for enforcement where we had protested it is inconsistent
20 with the Dealer Arbitration Act which didn't provide for
21 judicial review.

22 Now, the fact that -- I think my adversary pointed
23 out to the fact that October 31 is fast approaching. And under
24 the wind-down agreement, the Chevrolet dealership will be
25 terminated. And the new dealership that New GM had promised to

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1 -- an entity that used to be a Saturn dealership that operated
2 in the area is going to be given. And there are rights that
3 people have because of that unless something happens in this
4 court or another court. But there is this ticking deadline
5 that is there. And they never -- they filed a motion -- a
6 complaint in August. They themselves have never moved for an
7 injunction or for a stay or to try to continue the October 31
8 deadline. And I don't think that they can. I think that they
9 had agreed that it would get terminated. I think even the
10 Dealer Arbitration Act specifically wanted finality to these
11 issues and to have finality because it's not only New GM's
12 rights that are being implicated but we've had a dealer who's
13 effectively been on hold since December of 2009 waiting to go
14 in on November 1st. And their rights will be implicated as
15 well.

16 I think that, Your Honor, that with regard to the
17 interplay between the wind-down agreement and the Dealer
18 Arbitration Act -- the two most critical things is that there
19 is no judicial review that's specified in the statute. And
20 because there's no judicial review, you're left with a wind-
21 down agreement that had not been, in effect, modified at all
22 except for the overlay of allowing for binding arbitration on a
23 right given by Congress. And therefore, the commencement of
24 the lawsuit after the award had been given by the arbitrator is
25 a violation of the wind-down agreement and the provisions that

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1 say that you should not sue and you should not interfere.

2 I will note, because it hasn't been said, that the
3 arbitrator gave his award in June and New General Motors gave a
4 letter of intent for the other four dealerships that the
5 arbitrator said had to be reinstated. And Rally has been
6 reinstated for those other four dealerships. And this --

7 THE COURT: Oh. So when I said it won three-
8 quarters, actually it won four-fifths? Or with respect to four
9 of the five franchises that it once owned?

10 MR. STEINBERG: That's correct. So they are
11 operating right now. And they got their letter of intent which
12 was supposed to be given by New General Motors, I think, with
13 ten days of the arbitration award. It was only after that they
14 were well down the road to getting the four in place that they
15 decided to sue for the fifth. And, Your Honor, our brief tries
16 to strip away the layers. And to some extent when you orally
17 argue, you try to figure out how much of all the arguments you
18 have to make. But this was even governed by the Federal
19 Arbitration Act. I'm not even sure whether -- what they're
20 arguing about would be subject to any kind of judicial review
21 anyway. We do set forth in our brief the arguments that we
22 think show that there was -- that the arbitration award was
23 consistent with what should have been done because there was
24 not one franchise agreement but there were five franchises
25 agreement. And it's been dealt with because they've taken four

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1 of the five and we still have one that's outstanding. And we
2 point to the language of the sales agreement which talk about
3 "General Motors separately on behalf of its division
4 identified" and talk about the "separate" nature of each of
5 these agreements. The wind-down agreements uses the plural,
6 doesn't use the singular for purposes of talking about these
7 agreements. And not to be overly cute about the argument, but
8 if they were right that this was one agreement and not five
9 agreements and the arbitrator found a taint with regard to one
10 portion of an integrated agreement then the result would be the
11 same as if it was an executory contract under the Bankruptcy
12 Code with five lease schedules as part of one integrated
13 agreement where the debtor couldn't perform all five. It's an
14 all-up or nothing. And if that's the case, there would not
15 have been a reinstatement for all five instead of one. That's
16 the natural outflow of what their argument is which is that if
17 you've got a taint on an integrated agreement which is
18 nonsoluble then the whole agreement falls not that the whole
19 agreement becomes good. And so, what you have here is someone
20 who got the benefits of four dealerships. Then after they got
21 the four dealerships on the reinstatement decided to sue and is
22 now making an argument which is I want my cake, I want to eat
23 it, too, in the context of a statute that doesn't provide for
24 this type of relief.

25 Your Honor, if you'd just bear with me just one

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1 second, I just want to check my notes to see if I --

2 THE COURT: Sure.

3 MR. STEINBERG: -- have answered your questions.

4 (Pause)

5 MR. STEINBERG: I think, Your Honor, when you said --
6 you asked my adversary the question did the Dealer Arbitration
7 Act trump the wind-down agreement for all purposes and he
8 answered no that it was incumbent on you to try to make the two
9 consistent and coherent that he was essentially making the
10 argument that I'm asking Your Honor to, as well, which is that
11 the wind-down agreement had vitality and it was modified for
12 purposes of the covenant not to sue solely for the purposes of
13 doing the binding arbitration procedure consistent with the
14 statute that Congress had subsequently passed. Thank you.

15 THE COURT: Okay. Thank you. Mr. Snyder, reply?

16 MR. SNYDER: Your Honor, to first argue what is a
17 covered dealership, what is a not covered dealership to use
18 executory contract analyses versus using franchise law
19 analyses, using California law versus Title 11 law, that's
20 another reason why the California court has jurisdiction
21 because, again, what Mr. Steinberg is doing is saying well,
22 look, Judge, you have jurisdiction. You can apply bankruptcy
23 law between two nondebtor parties as to what means a covered
24 dealership under the Federal Arbitration Act. And any of the
25 600 dealers who applied for arbitration under GM could do that

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1 as well. And it seems to me that if Congress meant to give
2 dealers and the AAA jurisdiction over these acts then by a
3 natural extension, he meant them to be final and binding.
4 Counsel for New GM sort of takes the car and then he hits a
5 brake. He says the covenant not to sue was abrogated by the
6 Dealer Arbitration Act but it stops there, that there is no
7 right after the arbitration. And that is not true and also
8 doesn't address the question of federal question jurisdiction
9 that the federal court can possess jurisdiction over.

10 And he raised the Thomas case, Your Honor, but the
11 statute involved in the Thomas case is the Federal Insecticide
12 Fungicide and Rodenticide Act. In that statute, Your Honor,
13 and I cite to Section 136a(c)(1)(F)(iii) of Title 7: "The
14 FIFRA arbitration scheme allows judicial review of 'the
15 findings and determinations of the arbitrator' only in the
16 instance of fraud, misrepresentation or other misconduct by one
17 of the parties to the arbitration or the arbitrator. This
18 provision protects against arbitrators who abuse or exceed the
19 powers or willfully misconstrue their mandate under the
20 governing law." So Title 7 allowed for judicial review or
21 allowed for a response to Your Honor's question as to what
22 happens when an arbitrator acts inappropriately. Those last
23 quotes, by the way, Your Honor, were the Thompson v. Union
24 Carbide, 473 U.S. at 592.

25 Here there's nothing. There's no ability for Rally

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1 or any of the 600 dealers to get redress as a direct result of
2 the arbitrator's conduct no matter what it is. And so what
3 they're saying is everybody, come back here. And we just don't
4 believe that's appropriate under the case law. It's not
5 appropriate under Union Carbide. It's not appropriate under
6 Vaden. And it's not appropriate, we would suggest, under the
7 Second Circuit law.

8 Your Honor, the statute is less than a year old. Of
9 course, the cases we need to use are cases by analogy which are
10 the FAA statutes. So under the FAA -- I'm sorry -- line of
11 cases, there are agreements. Agreed. But that doesn't mean
12 the arguments aren't consistent because the AAA rules assume
13 that if you're a party to the arbitration you've agreed to
14 consent to the outcome. In the Second Circuit case, in the
15 Idea Nuova case, the statute is silent just like the statute --
16 I'm sorry -- the agreement is silent just like the statute here
17 is silent. AAA rules apply and we're not saying anything else.
18 And the Second Circuit said if the AAA rules apply then
19 whatever the arbitrator says is final and binding and the
20 unhappy party can then go to the district court and try to
21 confirm that arbitration. Makes sense. That's all we're
22 seeking to do here. The statute is silent. To suggest that we
23 have no right of judicial review of an arbitration belies the
24 fact that every stage plus Title 9 allow for confirmation,
25 vacature, review of arbitrations.

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1 Now, Mr. Steinberg is right. The statute 48(c) only
2 speaks to judgment. And maybe the California district court'll
3 say you can only seek to confirm the judgment. You can't seek
4 to vacate it. You can't seek to modify it. And interprets
5 Rule 48(c) that way as counsel did. But why can't Rally have
6 the chance to allow California law to do that?

7 Your Honor, this is important. I'd like to go
8 through the wind-down agreement and the jurisdiction sections
9 because they are not inconsistent with the relief we're seeking
10 here. This is from GM's own motion. "The Court retains
11 exclusive jurisdiction to enforce and implement the terms of
12 this order, the MSPA," which is the wind-down agreements, "and
13 each of the agreements executed in connection therewith,
14 including the deferred termination agreement in all respects
15 including, but not limited to, retaining jurisdiction to
16 resolve any disputes with respect to or concerning the deferred
17 termination agreements."

18 There's no dispute regarding the deferred termination
19 agreements at all. There's a dispute as to whether Chevy is a
20 covered dealership under the Dealer Arbitration Act. We take
21 no position as to whether this Court -- the sale order speaks
22 for itself. Section 13 of the wind-down agreement.
23 "Continuing jurisdiction. By executing this agreement, Dealer
24 hereby consents and agrees that the bankruptcy court shall
25 retain full complete and exclusive jurisdiction to interpret,

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1 enforce and adjudicate disputes concerning the terms of this
2 agreement and any matters related therein and survives
3 termination."

4 Absolutely. There's an October 31st deadline. The
5 wind-down agreement sets that out. We're bound to the extent
6 we're bound under the wind-down agreement. We've asked GM to
7 extend the October 31st date because of the late hour. They've
8 refused. So now we have to deal with the October 31st deadline
9 or get an extension by a court of competent jurisdiction.

10 But we're not addressing any of those provisions.

11 Our -- we are seeking jurisdiction based on the Dealer
12 Arbitration Act and not on the sale order and not on the wind-
13 down agreements. This Court still has jurisdiction over those.

14 Your Honor, the argument about timing -- no good deed
15 goes unpunished. They answered on September 7th and came into
16 this court on September 10th. And then when we tried to get a
17 hearing date as quickly as possible, we agreed we wouldn't go
18 to the court in California to seek a stay if we could get a
19 hearing date on October 4th. And we've abided by our agreement
20 and we're anxiously awaiting whatever the Court's determination
21 is going to be. But we deferred to this Court first because
22 that's where New GM went. And nobody delayed here. As soon as
23 the motion was filed, we sought a quick hearing and we got one
24 thanks to chambers and Your Honor's courtesy. But -- I believe
25 I'm finished.

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1 THE COURT: All right. Very well. All right. We're
2 going to take a recess. I don't know how long it's going to
3 take me. But you needn't be here before 4:30. And I'll come
4 out with a ruling as soon thereafter as I can. We're in
5 recess.

6 (Recess from 4:04 p.m. until 5:30 p.m.)

7 THE COURT: Have seats, please. I apologize for
8 keeping you all waiting. In these jointly administered cases
9 under Chapter 11 of the Code, General Motors LLC, which I'll
10 normally refer to as New GM, moves for an order enjoining Rally
11 Dealership from interfering with New GM's ability to, as it was
12 put, to reform its dealership platform pursuant to a previous
13 order I entered, from vacating or modifying an arbitration
14 decision and from pursuing that effort in California district
15 court.

16 Rally was a GM dealership that was being closed
17 pursuant to an agreement that was acquired by New GM from Old
18 GM. The Dealer Arbitration Act, which was subsequently signed
19 into law, provided an opportunity for dealers such as Rally to
20 become reinstated as New GM dealers, if they were successful in
21 a binding arbitration proceeding, with New GM.

22 Rally won its arbitration proceeding with respect to
23 three of its brands but not its Chevrolet brand. Rally is
24 attempting to have this arbitration award modified or vacated
25 in a federal district court in California. New GM argues that

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1 there is no right to modify the arbitration award and,
2 additionally, that my Court is the only forum that can hear
3 this issue. In addition, New GM argues that Rally has been
4 interfering with New GM's establishment of an alternate Chevy
5 dealership in violation of its agreement with New GM.

6 While I understand the difficulties faced by dealers
7 such as Rally as a consequence of the events of last year, the
8 motion must be granted. The following are my findings of fact
9 and conclusions of law in connection with this determination.

10 As facts, I find that on July 5th, 2009, I entered
11 the 363 sale order. That sale order authorized and approved a
12 master purchase agreement dated as June 26, 2009, often
13 referred by the parties as the MPA, between Old GM and an
14 entity that later became New GM. Pursuant to the MPA and the
15 363 sale order, on July 10, 2009, New GM purchased
16 substantially all of Old GM's assets free and clear of Old GM's
17 liabilities except as expressly assumed by New GM under the
18 MPA.

19 As part of the transactions that were approved under
20 the 363 sale order, Old GM entered into and assigned to New GM
21 certain deferred termination agreements, which we refer to as
22 wind-down agreements, which had originally been entered into
23 between Old GM and certain of its authorized dealers. These
24 agreements had been offered to dealers as an alternative to
25 outright rejection of their dealer sales and service

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1 agreements, which we sometimes refer to as dealer agreements
2 under the rights afforded to debtors to reject executory
3 contracts under 365 of the Code. The wind-down agreements
4 provided, among other things, that in exchange for certain
5 payments and other consideration, the affected dealers' dealer
6 agreements would terminate no later than October 31, 2010.

7 In December 2009, Congress enacted into law a new
8 statute called the Dealer Arbitration Act which gave wind-down
9 dealers such as Rally the opportunity to seek reinstatement to
10 the GM dealer network through a binding arbitration process.
11 Rally timely filed a request for arbitration and an arbitration
12 was held in May before an arbitrator -- arbitrator in
13 California. On June 8, 2010, the arbitrator issued an award
14 directing New GM to reinstate Rally's Buick, Cadillac and GMC
15 dealer agreements but ruling that Rally's Chevrolet dealer
16 agreement should not be reinstated. New GM is now currently
17 attempting to establish another Chevrolet dealership in the
18 Palmdale, California area where Rally is located. During this
19 process, the owner of Rally has continued to lobby New GM to
20 reinstate his Chevy dealership. After various proceedings, New
21 GM determined to relocate the Chevy dealership to Lancaster,
22 California which triggered an action by Palmdale against the
23 city of Lancaster in the Superior Court of California.
24 Palmdale claims that the terms of an agreement between
25 Lancaster and the new Chevy dealership violated a state law

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1 that prevent cities from engaging in bidding wars to lure auto
2 dealers and other large sales techs generating businesses to
3 relocate them from one city to another. The owner of Rally,
4 one Mr. Mayle, provided an affidavit on behalf of Palmdale in
5 that action. New GM argues that Rally, through its agent, Mr.
6 Mayle, is providing assistance in litigation against New GM and
7 is interfering with the establishment of a new dealership in
8 violation of the wind-down agreement.

9 Rally argues that the arbitrator was bound by the
10 Dealer Arbitration Act to either reject or accept the entire
11 dealer contract and that the arbitrator exceeded his authority
12 by not reinstating the Chevy brand as well. Thus, on August
13 13, 2010, Rally filed suit in California district court seeking
14 to vacate or modify the arbitration award and to prevent
15 termination of his Chevy dealer agreement though presumably
16 wishing to maintain intact the other aspects of the
17 arbitrator's award which maintained his dealerships for the
18 other three brands, Cadillac, Buick and GMC.

19 Rally alleges, in substance, that the arbitrator's
20 award in not giving him a complete victory was erroneous as a
21 matter of law in its failure to accept its position that all of
22 the separate brands had to be considered together in the
23 species of double or nothing. He has not alleged that the
24 arbitration award was the result of bribery, fraud, corruption,
25 manifest disregard of settled law or any other ground that

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1 would be a basis for vacating an arbitration award if the
2 Federal Arbitration Act applied.

3 I'll now turn to my conclusions of law. Turning
4 first to jurisdiction and within the jurisdiction umbrella,
5 first, to subject matter jurisdiction. First, it's plain that
6 the district courts and bankruptcy courts in this district have
7 subject matter jurisdiction over this controversy. The
8 applicable subject matter jurisdiction statute is 28 U.S.C.,
9 Section 1334, the section of the judicial code that follows the
10 judicial code sections relating to federal question, diversity
11 and admiralty jurisdiction. 1334 deals with subject matter
12 jurisdiction with respect to bankruptcy cases and proceedings.
13 That section provides, in relevant part, subsection (b), with
14 exceptions not relevant here, "the district courts shall have
15 original but not exclusive jurisdiction of all civil
16 proceedings arising under title 11, or arising in or related to
17 cases under title 11".

18 Rally addresses the issue of "related-to"
19 jurisdiction under 1334 but that isn't the relevant subject
20 matter jurisdiction issue. Rather it's the "arising in" prong
21 of 1334 where New GM relies on an order I entered last year in
22 this case under which this Court retained exclusive
23 jurisdiction in paragraph 71(f) to "resolve any disputes with
24 respect to or concerning the deferred termination agreements".
25 The deferred termination agreements, which as I noted are also

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1 referred to as the wind-down agreements, included provisions by
2 which dealers and New GM contractually agreed that this Court
3 retained full and exclusive jurisdiction to enforce them as
4 well as to specifically preclude Rally and other wind-down
5 dealers from filing suit against New GM and taking any action
6 to interfere with New GM's establishment of additional
7 dealerships. I'll note parenthetically that there was nothing
8 in the Dealer Arbitration Act to modify the subject matter
9 jurisdiction of the federal courts nor to modify any of my
10 earlier orders other than to provide what amounted to a defense
11 to enforcement of the deferred termination agreements if and to
12 the extent that a dealer prevailed in the arbitration process
13 for which Congress provided.

14 Rally did prevail in the arbitration process with
15 respect to three of its franchises and, presumably, would like
16 to avail itself and enforce that part of the arbitration award.
17 But it wishes to upset the arbitration result as to which it
18 didn't prevail and used the hoped-for alternative result, that
19 is, a reinstatement of its Chevy franchise, as a defense to its
20 duties under the deferred termination agreement which duties
21 otherwise obligated it to give up its Chevy dealership, that
22 being a classic "dispute with respect to or concerning the
23 deferred termination agreements".

24 Now, Rally may have come to an agreement by the end
25 of oral argument. But in any event, I so rule that this Court

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1 does have subject matter jurisdiction over this controversy.

2 Similarly, I find that this is a core matter. Under
3 28 U.S.C., Section 157(a)(2)(N), core matters include, with
4 exceptions not relevant here, orders approving the sale of
5 property. The 363 sale order and my approval of the wind-down
6 agreement documented the outcome of those core proceedings.
7 And a proceeding such as the motion now before me which seeks
8 relief predicated on a "retained jurisdiction" clause in my
9 order resolving a core matter is a core matter as well. The
10 decision in Eveleth Mines, 312 B.R. at pages 644 to 645, is
11 directly on point. In that case, the Court noted the motion
12 that barred directly and necessarily comes out of a core
13 proceeding in this case, the debtors' motion for authority to
14 conduct a sale of assets of the estate free and clear of liens.
15 Court proceedings under 28 U.S.C., Section 157(b) fall under
16 the "arising under" or "arising in" jurisdiction of 28 U.S.C.
17 Section 1334(b). Then the enforcement of orders resulting from
18 core proceedings are themselves considered core proceedings.

19 The Second Circuit has held similarly. It's held
20 that bankruptcy courts are empowered to enforce the sale orders
21 that they enter and to protect the rights which were
22 established by the sale order. See Millennium Seacarriers, 419
23 F.3d at 97; and Petrie Retail, 304 F.3d at 229-230. Petrie
24 Retail is particularly instructive because it also dealt with a
25 dispute between two nondebtors addressing rights that were

1 created by the sale order. Though Petrie Retail was not
2 unanimous, it's no less binding on the lower courts for that
3 reason.

4 Now there can be no dispute what the sale order
5 actually said. Nor can there be any dispute as to the wind-
6 down agreement said. Section 13 of the wind-down agreement had
7 that continuing jurisdiction clause providing that the dealer
8 hereby consented to and agreed that the bankruptcy court would
9 retain full complete and exclusive jurisdiction to interpret,
10 enforce and adjudicate disputes concerning the terms of this
11 agreement and any other matter related thereto.

12 Here and to the extent Rally was successful in the
13 arbitration, of course that would be a defense to win any
14 effort to make it terminate its agreement. And to the extent
15 that it wishes to either enforce the agreement as it has the
16 right to do with the three franchises for which it prevailed or
17 to defeat the agreement with respect to the one agreement where
18 it lost, in any event they concern the terms of the agreement
19 and, in particular, any other matter related thereto. I don't
20 think that's subject to serious dispute.

21 Finally, I've considered and ultimately rejected
22 Rally's suggestion that I exercise discretionary abstention on
23 that. Plainly, there is a right to invoke discretionary
24 invention under 1334(c)(1) of the judicial code. That's 28
25 U.S.C. Section 1334(c)(1) which provides that nothing in this

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1 section prevents a district court in the interest of justice or
2 in the interest of comity with state courts or respect for
3 state law from abstaining or hearing a particular proceeding
4 arising under Title 11 or arising in or related to a case until
5 Title 11. And while it speaks principally of state courts and
6 state law, I accept for the purposes of this analysis that we,
7 bankruptcy courts have the power to abstain in favor of other
8 federal courts when the circumstances so warrant. But I don't
9 believe that the factors here so warrant. Standards that have
10 been articulated for the exercise of discretionary abstention
11 include of the efficient administration of the bankruptcy
12 estate, comity, the degree of relatedness or remoteness of the
13 proceeding to the main bankruptcy case, the existence of the
14 right a trial and prejudice to the involuntarily removed party.
15 Some of these, obviously, come in removal cases.

16 Here, I think the factor that is most important is
17 the effect of the effect deficient administration of the
18 bankruptcy estate. This was a procedure that needed to be
19 resolved quickly as evidenced by the very tight time frames
20 that Congress imposed. As important or more so, the bidders of
21 the world that come in to bid for assets in the bankruptcy
22 court must have knowledge that bankruptcy courts will stand by
23 the documents as they were then drafted to give the parties to
24 those agreements the predictability in their relations for
25 which they are binding and upon which they justifiably rely.

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1 The Court in Eveleth Mines explained "as applied to a sale free
2 and clear of liens, there are also good policy reasons for
3 making a derivative core proceeding classification. Active
4 bidding on assets from bankruptcy estates will be promoted if
5 prospective purchasers have the assurance that they may go back
6 to the originally forum that authorized the sale for a
7 construction or clarification of the terms of the sale that it
8 approved. Relegating post-sale disputes to a different forum
9 injects an uncertainty into the sale process which would dampen
10 interest and hinder the maximization of value. A purchaser
11 that relies on the terms of a bankruptcy court's order and
12 whose title and rights are given life by that order should have
13 a forum in the issuing court." That is very strong guidance
14 that suggests that a Court, like me, should not abstain in
15 favor of another jurisdiction.

16 Similarly, comity is a factor that I would take into
17 account if there were, as contrasted to here, strong state law
18 concerns. But here, of course, there are not. I, no less
19 than a district court, either in New York or California, can
20 determine that which is just in determining whether or not to
21 enforce or, as more relevant here, to undercut an arbitration
22 award.

23 The degree of relatedness or remoteness of the
24 proceeding to the main bankruptcy court is subject to a double
25 entendre. On the one hand, this is not going to affect the

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1 assets and order of its liquidation in court. But the factors
2 articulated in Eveleth Mines likewise cause Courts here to be
3 slow to abstain because giving purchasers of assets the comfort
4 that their needs and concerns are going to be addressed is
5 pretty important.

6 I consider the existence of the right to a jury trial
7 inapplicable because I assume that this would be decided
8 without a jury trial in either events and I also consider
9 prejudice to the involuntary removed party under the facts of
10 this case.

11 So for all of these reasons, I decline to exercise
12 discretionary abstention.

13 Now turning to what I should do with this controversy
14 before me. Both sides now seem to agree that the Federal
15 Arbitration Act doesn't apply because it implements contractual
16 agreements to arbitrate. And here, the right to compel
17 arbitration comes not from a contract but from the Dealer
18 Arbitration Act itself. And it also now appears to be
19 undisputed that the Dealer Arbitration Act doesn't provide for
20 judicial review of arbitration awards issued after the
21 mechanisms for which the Dealer Arbitration Act provides.

22 Nor do I think that I can or should find an applied
23 right to judicial review under that statute. First, as you
24 know from reading many earlier decisions that I've issued, I
25 start with textural analysis where I note the significant

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1 absence of such a provision when federal statutes routinely
2 provide for rights to federal -- to judicial review when that
3 is the congressional intent. If I were to imply such a
4 provision here that would be a species of judicial legislation.
5 Second, assuming without deciding that I could appropriately
6 look at legislative history on a matter where the statute is
7 not in any way ambiguous, judicially in grafting rights under
8 that statute would be particularly inappropriate when they'd be
9 inconsistent with the congressional desire to establish this
10 mechanism to avoid the excessive costs and delays of litigation
11 and to impose tight deadlines to get the arbitration process
12 completed.

13 Nor can I accept Rally's argument that New GM
14 conceded a right to judicial review by reason of its
15 willingness to proceed under the AAA's commercial arbitration
16 rules. In responding to Rally's arbitration demand, New GM
17 expressly stated that it did not waive any objections it might
18 have to the arbitration or to any of the AAA's commercial
19 arbitration rules including, in particular, where such rules
20 would be inconsistent with the provisions or purposes of the
21 Dealer Arbitration Act. For that same reason, I can't find a
22 waiver on the part of New GM of its rights based on a failure
23 to protest again after its initial reservation of rights was
24 put on the record.

25 Then even if New GM had agreed to AAA arbitration

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1 rules, the arbitration rules called for a mechanism to enforce
2 an award not to attack it. Those rules provided that parties
3 to an arbitration under these rules shall be deemed to have
4 consented the judgment upon the arbitration award may be
5 entered in any federal or state court having jurisdiction
6 thereof. See Rule 48(c) of the AAA Commercial Rules quoted at
7 paragraph 29 of the Rally brief.

8 But that language conveys a right to enforce the
9 arbitration award not to attack it. For example, if New GM had
10 failed notwithstanding the arbitration award that Rally doesn't
11 complain about to let Rally keep the three franchises the
12 arbitrator said Rally could keep, Rally could have, at least
13 arguably if not plainly in my view, come back to me and say
14 make New GM do what the arbitrator said it should do. But this
15 is the exact opposite of what we have here and one that's not
16 authorized by the federal statute.

17 As I indicated in oral argument, and I think both
18 sides agreed, the reasonable course for a judge in my position
19 would be to construe the Court's earlier order and the
20 subsequently enacted federal legislation to achieve as much
21 harmony as possible and to honor the congressional intent to
22 the extent that the federal legislation trumped my earlier
23 order. But it would also be appropriate in my view to honor
24 the congressional intent only to the extent that the federal
25 legislation trumped my earlier order. Congress did say, of

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1 course, with respect to providing for a defense to enforcement
2 of the wind-down agreements with respect to any areas where the
3 arbitrator ruled in the dealer's favor. And I think that if
4 New GM had failed to honor the arbitrator's award, as I
5 indicated a moment ago, I'd almost certainly enforce it. But
6 that is the way by which we'd maintain harmony between my
7 earlier order and the new Dealer Arbitration Act providing for
8 the rights of dealers to invoke the arbitration mechanism in
9 the fashion for which Congress provided. It doesn't provide
10 for a blank check from me to rewrite the Dealer Arbitration
11 Act.

12 Nor do I think that Rally can get around what is, in
13 essence, an effort to achieve a quasi-appellate review of the
14 arbitration award by saying that it's asking the California
15 district court to make a federal question type determination
16 under the Dealer Arbitration Act. That might be the case if
17 Congress hadn't established the arbitration mechanism and if it
18 had conferred on the district court's jurisdiction to decide
19 issues as to what is or is not a dealership franchise. But the
20 whole point of the statutory scheme was that New GM and dealers
21 would proceed by arbitration. And while, if New GM had refused
22 to arbitrate in the first place, I think that at least I would
23 have had jurisdiction to order New GM to do so. But now that
24 each of New GM and Rally have engaged in the arbitration
25 process, presumably without any Court forcing either to do so,

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1 we can't make the underlying arbitration award evaporate. We
2 can only consider the circumstances, if any, under which the
3 arbitration award is subject to judicial review. And I've
4 already noted, of course, that the statute doesn't provide for
5 such review.

6 Now, in that connection, I do not believe that under
7 the allegations we have here, this construction raises
8 constitutional issues. I assume without deciding that
9 procedural due process requires a quasi-judicial determination,
10 like an arbitration, to be conducted by a decider who isn't
11 taking bribes or conspiring with one or another of the parties
12 or, though it's more debatable, who ignored facts or binding
13 authority on point. If there were such a contention, I'd at
14 least have to consider whether I'd address it. And I think
15 it's better to construe the Dealer Arbitration Act in such a
16 fashion as to avoid any constitutional issues that would
17 otherwise be relevant.

18 But I have no allegations of bribes, conspiracy,
19 fraud or even manifest disregard of existing law in the matter
20 before me. Though, if there were such allegations, I think I'd
21 have to seriously consider whether there might be some implied
22 right to remedy such a wrong or that in exercising my exclusive
23 to jurisdiction to enforce or, impliedly, deny enforcement of
24 the deferred termination agreements, I should take such facts
25 into account. But once more, I emphasize that I have no such

1 allegations here.

2 In the absence of issues of that character, I think
3 that Thomas and, particularly, Switchmen, the two decisions by
4 the Supreme Court, apply to establish a rule that where an
5 arbitrator was given the power to resolve controversies under a
6 statute, that is, the Dealer Arbitration Act, where dealers and
7 New GM were given rights under that statute, reviewed by the
8 federal district courts or, of course, bankruptcy courts that
9 are arms of the district court and have the power to issue
10 final orders on core matters, of the arbitrator's determination
11 is not necessary to protect those rights. I think I should
12 restate it because I put too many parentheticals in there.
13 Where dealers and New GM were given rights under the statute
14 reviewed by the federal district courts of the arbitrator's
15 determination is not necessary to protect those rights. And,
16 of course, that's a paraphrase of Thomas, 473 U.S. at 588
17 quoting Switchmen where I'm analytically substituting the
18 Dealer Arbitration Act for the Railroad Labor Act and where I'm
19 substituting arbitrator's determination for board's
20 determination.

21 So I don't believe that judicial review is necessary
22 except in those cases not presented here, and here only
23 arguably, where there are allegations of fraud, corruption or
24 manifest disregard of an existing decision. And for reasons I
25 described above, I think the exclusive jurisdiction provisions

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1 of the sale order must stick.

2 First, of course, they're res judicata so they remain
3 binding in the absence of an appellate ruling changing them for
4 a legislative pronouncement that does so. Second, I assume
5 without deciding that Congress could, if it wished, to have
6 taken my exclusive jurisdiction away just as Congress can take
7 away jurisdiction from the lower federal courts on other
8 matters. But Congress didn't do that. If we temporarily put
9 aside issues as to the right to judicial review and decisions
10 as to the merits, I assume, without deciding, that a California
11 district court could under its diversity jurisdiction have
12 subject matter jurisdiction over a controversy like this one.
13 But if it did, it would be foreclosed from exercising its
14 subject matter jurisdiction by reason of the final exclusive
15 jurisdiction order that I entered back in July of 2009. This
16 is no different analytically than the effect that an exclusive
17 jurisdiction order would have over a state court proceeding.
18 Most state courts don't need an expressed grant of subject
19 matter jurisdiction to hear controversies before them. They
20 normally have subject matter jurisdiction over whatever comes
21 through their doors. But that doesn't mean that they can hear
22 controversies when a court order or other federal law, like
23 some federal antitrust laws or securities laws, give a federal
24 court exclusive jurisdiction. Some federal statutes and the
25 order that I entered into are limits on jurisdiction that might

1 otherwise exist.

2 Then Rally makes a judicial estoppel argument noting
3 that in a proceeding against another dealer, New GM brought an
4 action in federal court in California invoking diversity and
5 federal question jurisdiction, the latter under the Dealer
6 Arbitration Act, seeking to require that dealer to comply with
7 a settlement agreement and to drop its efforts to proceed under
8 the Dealer Arbitration Act. Frankly, I'm not impressed with
9 the wisdom of that approach and, for the life of me, can't
10 understand why New GM sought relief that way instead of coming
11 to me. But I don't think its effort in that regard rises to a
12 level of a judicial estoppel.

13 Rally depends on three statements to establish its
14 claim of judicial estoppel. They are that the district court
15 would have jurisdiction under 28 U.S.C. 1332; that the district
16 court would have federal question jurisdiction under 28 U.S.C.
17 1331 because the controversy there allegedly arose under the
18 Dealer Arbitration Act; and that arbitrators would only be
19 empowered to decide whether or not the specific dealership
20 should be added back to the GM dealer network and that "all
21 other issues that arise under the Act must be addressed by a
22 Court of competent jurisdiction".

23 I don't think that any of these are particularly to
24 the point. I've noted before that I assume that diversity
25 jurisdiction provides subject matter jurisdiction to the

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1 California court here. But I've also ruled that that can't
2 trump the bankruptcy court's exclusive jurisdiction provision.
3 And while I disagree that there and here would be federal
4 question jurisdiction under the Dealer Arbitration Act for the
5 particular claim there and here asserted, even if there were
6 such federal question jurisdiction, once more, it wouldn't
7 trump the bankruptcy court's exclusive jurisdiction provision.
8 And I don't think there's anything particularly inconsistent
9 between New GM's third point in that Santa Monica action and
10 the points it's making here given the difference between the
11 facts in each of those cases and the context in which New GM
12 made its observations. There, an attempt to enforce a
13 settlement agreement under which the namees (ph.) agreed to
14 dismiss their arbitration and New GM was saying that
15 arbitration wasn't appropriate at all rather than dealing with
16 the consequences of a completed arbitration in which there was
17 an arbitration award.

18 But even if there were, I'd see other problems in
19 invoking judicial estoppel as well. As Rally notes, at page 23
20 in its brief, citing the Second Circuit's decision in *Uneeda*
21 *Doll Company*, "judicial estoppel prevents a party from
22 asserting a factual position in one legal proceeding that's
23 contrary to a position that it successfully advanced in another
24 proceeding". Here, aside from the lack of inconsistencies, the
25 positions that have been taken are legal not factual. And

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1 there, New GM didn't ask the Santa Monica Motors court to
2 interpret or enforce the wind-down agreement or, indeed, to
3 interpret or enforce the Dealer Arbitration Act at all. The
4 latter point is why I think that New GM was just wrong when it
5 then tried to invoke the latter as a basis for 1331
6 jurisdiction. I'm not sure what it was thinking. But under
7 the standards of *New Hampshire v. Maine*, I find that the
8 positions are not clearly inconsistent and I cannot find any
9 perception that either the first or the second Court was misled
10 or that New GM would derive an unfair advantage here if not
11 estopped.

12 Finally, I think that even if judicial review were
13 available of the arbitrator's award, I couldn't vacate the
14 arbitrator's award here. First, even if the arbitrator was
15 wrong, I don't see the arbitrator having been so wrong that the
16 error would warrant bucking fundamental principles limiting the
17 scope of review of arbitration awards. There was no case
18 supporting Rally on this issue. Rally is, in substance, asking
19 the Court or the Courts to, in essence, make new law on this
20 point.

21 And assuming, though for reasons I just noted, I
22 think this assumption is unwarranted, that I could provide ab
23 initio review of the arbitrator's decision, I think the
24 arbitrator got it right at least on the arbitrator's assumption
25 that he could rule one way with respect to the Buick, GMC and

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1 Cadillac franchises and differently with respect to the Chevy
2 franchise. I think the dealer's sales and service agreements
3 have to be read separately. Each stated that it was executed
4 by GM "separately" on behalf of its division identified in the
5 specific addendum. And each dealer agreement provided that the
6 agreement for each line make is independent and separately
7 enforceable by each party and the use of the common form is
8 intended solely to simplify execution of the agreements. So I
9 think that in light of that, Rally had five franchise
10 agreements under which the arbitrator's ruling focusing on each
11 brand separately would be more than merely reasonable. If
12 otherwise warranted by the underlying facts, it would be right.

13 For the foregoing reasons, New GM is to settle an
14 order in accordance with the foregoing as quickly as reasonably
15 possible, that order to be settled on no less than two business
16 days' notice by hand, fax or e-mail. I assume that New GM will
17 use one of those methods so I don't have to provide for an
18 alternative mechanism if it were to use snail mail. The time
19 to appeal from this determination will run from the time of
20 that order's entry and not from the time of this dictated
21 decision.

22 All right. Not by way of reargument, are there any
23 matters that I failed to address or any questions?

24 MR. SNYDER: No, Your Honor.

25 THE COURT: Hearing none, we're adjourned. Good

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1 evening, folks.

2 MR. SNYDER: Your Honor, if I may just quickly?

3 THE COURT: Yes, Mr. Snyder?

4 MR. SNYDER: Your Honor, under Bankruptcy Rule 8005,
5 to the extent we seek a stay pending appeal and that would be a
6 necessary predicate for an award, for the reasons set forth in
7 our papers and in the oral argument, I request -- am making
8 this oral application for a stay of Your Honor's order pending
9 appeal.

10 THE COURT: I'll accept the oral application for a
11 stay but we'll do it after a ten minute recess. And each of
12 you can make your points at that point in time.

13 MR. SNYDER: Thank you, Your Honor.

14 (Recess from 6:19 p.m. until 6:37 p.m.)

15 THE COURT: Have seats, please. Okay. Mr. Snyder,
16 your application for a stay.

17 MR. SNYDER: Thank you, Your Honor. Your Honor, in
18 your decision, I believe the Court stated -- and I apologize if
19 I'm putting words in the Court's mouth -- that areas such as
20 manifest disregard for the law and fraud were not areas that
21 were alleged here. And that might be properly the province if
22 not exclusively the province of the district court in
23 California. And I would ask the Court to turn to, Your Honor,
24 Exhibit I which is Rally's petition to modify. And in Exhibit
25 I, Your Honor, starting on page 10, whether appropriately or

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1 not, Rally uses the Federal Arbitration Act as a guide as to
2 what the district court can look to when determining whether it
3 has jurisdiction. And it starts at the bottom of page 10, and
4 I'm quoting, "that the arbitrator in this matter was guilty of
5 misconduct, misbehavior and exceeded his power, i.e., manifest
6 disregard by ruling on a matter not submitted for determination
7 and, (2) attempting to fashion a remedy not authorized by
8 Section 747 of the Act." And the argument goes on and a little
9 farther down, it addresses corruption, fraud and undue means by
10 GM which, again, although it mirrors a section of the FAA, is
11 also grounds that Rally sought in the California district court
12 in order to vacate and modify the arbitration. So I wanted the
13 record clear that the manifest disregard of the law, fraud and
14 the usual grounds that a party would seek whether under a state
15 statute or the federal arbitration statute to undo the
16 arbitration were pled by Rally in the California action. And
17 so, I believe that those types of matters, and I believe Your
18 Honor pointed this out, matters of manifest disregard, fact and
19 law as well as fraud, corruption, mistake and exceeding powers
20 are matters that the California district court should hear --
21 can hear, excuse me, and should hear.

22 Your Honor, has basically said that you have sole and
23 exclusive jurisdiction even though the district court may have
24 jurisdiction over these matters. And as respectfully submitted
25 that the Court may have concurrent jurisdiction but over

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1 matters such as manifest disregard of the law that the federal
2 district court in California also has jurisdiction over this
3 matter. And it's properly before it now.

4 With respect to the federal question, again, Your
5 Honor seemed to indicate in his decision that the sole and
6 exclusive jurisdiction was given to the bankruptcy court as a
7 result of the wind-down orders. The Court did not address as
8 we go through in detail, starting at page 28 of our objection,
9 the decision of the Supreme Court in Vaden v. Discover Bank.
10 And I alluded to it, Your Honor, in the original argument. But
11 the Supreme Court, overturning, I believe, four circuit courts
12 in Vaden, specifically held that they can look through the
13 petition to look at the parties' underlying substantive
14 controversy. And, Your Honor -- and this is where the Court
15 and Rally might differ. The substantive controversy, the
16 predicate of the petition arises under the Dealer Arbitration
17 Act. It does not arise under the wind-down agreement because
18 it was created not from the wind-down agreement but the Dealer
19 Arbitration Act. So I think there's compelling reasons as a
20 result of the recent Supreme Court case in Vaden to allow the
21 federal district court to hear a federal controversy arising
22 out of a federal statute. And I've been practicing here for a
23 long time, Your Honor. To the extent that it's an issue
24 involving a purchaser wanting to get its -- the value of what
25 it bargained for, we are not saying this Court does not have

1 jurisdiction. The Court has already held that it has arising-
2 to jurisdiction and it may well have that jurisdiction.

3 But I think I've pointed to at least two, the federal
4 question issue as well as the due process constitutionality
5 issue as to why the California district court has strong --
6 strong subject matter -- rights to exercise its subject matter
7 jurisdiction. This is not a cursory -- a statute that only
8 cursorily affects the federal court, but it directly affects
9 the federal court. And I believe, Your Honor, for those
10 reasons, the Court not entertaining or analyzing that and then
11 not seeing that the petition itself does seek -- does allege
12 manifest errors of law as well as fraud and improper powers by
13 the arbitrator that we would be successful on the merits. And
14 we would be able to, Your Honor, obtain a stay of Your Honor's
15 order to the extent it would give us additional time to seek a
16 stay or to seek a determination in either the district court
17 here or in California.

18 THE COURT: Well, I understand your desire to go to
19 the district court here. I have more trouble trying to go to
20 the district court in California. In fact, that walks, talks
21 and quacks a lot about the actions that Judge Weinfeld found so
22 objectionable in Teachers Insurance v. Butler before the Second
23 Circuit said what it said in Teachers Insurance v. Butler where
24 there was never to collaterally attack his judgment by going to
25 another court. I mean, I don't claim to be infallible, Mr.

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1 Snyder, but it seems to me that if somebody's going to say that
2 I'm wrong, it's got to be either the district court or the
3 Second Circuit.

4 MR. SNYDER: Your Honor, we were in front of the
5 California district court before GM was here. We can always go
6 back to the filing of the bankruptcy case. But this is clearly
7 different than Teachers. Here, we have already commenced an
8 action in the California district court. We're not forum
9 shopping and running to California because we don't like what
10 the Court is saying. We deferred in this case because they
11 made the motion that we were going to defer to the bankruptcy
12 court before we took any action in California. But we're not
13 looking around for a second bite of the apple. We're already
14 in California. Issues already been joined. They've already
15 answered. So we're at summary judgment stage anyway in
16 California and we have a ticking clock of October 31st. That's
17 very different than going to another Court when you don't like
18 what this Court has to say, Your Honor. I mean, I don't know
19 if we need to address that here. But that's not what we're
20 looking to do. It's for powers other than I to decide whether
21 we seek a stay here or we go back to the Court where there's
22 been a complaint and answer filed and seek a stay there. I'm
23 being straightforward with the Court. It's not our intent and
24 I know the Court might have discomfort with that, but the
25 action was already commenced there. And that's what led to GM

1 coming here.

2 THE COURT: Well, forgive me, Mr. Snyder. The reason
3 that you can truthfully say it's discomfort is because I try
4 very hard to consume my anger and to maintain my demeanor. I
5 fully understand the rights of any litigant before me to take
6 me up the street. But going to another Court right after
7 you've litigated before me for the last three hours and I've
8 given you a ruling which may or may not be right but which was
9 after a lot of thought and effort is one that is more than a
10 source of discomfort.

11 Why don't you continue with the remainder of the
12 three bullets on the applicable case law on an entitlement to a
13 stay and address, if you will, what you're prepared to offer in
14 the way of a bond if I grant a stay?

15 MR. SNYDER: Your Honor, the argument with respect to
16 the constitutionality -- I had made the argument with respect
17 to whether a federal question exists vis-à-vis the
18 interpretation of the federal statute and going behind the
19 arbitration. I made as well -- I would point out, Your Honor,
20 actually there are four grounds. The third one is diversity.
21 And I think although GM was silent on it, the Court, I believe,
22 in its decision, admitted that diversity exists but, again,
23 stated that the sale order would trump the district court even
24 though diversity might existed there. And the fourth argument,
25 Your Honor, is 48(c) and Your Honor is correct. It does just

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1 refer to judgment. It does not refer to the right to vacate or
2 amend or to modify. It's respectfully submitted, though, Your
3 Honor, that the district court can make that decision as well.
4 Your Honor may be right in all they can do is say thumbs up or
5 thumbs down with respect to a judgment. But at least with
6 respect, I believe, to the fifty state laws, with respect to
7 arbitration and the FAA, it's not so limited, that applicants
8 are usually allowed by statute, certainly under the FAA, to not
9 only seek a judgment but to modify or vacate. But that's
10 something the California district court may hold as well, Your
11 Honor.

12 And because there are five sep -- four separate
13 grounds, the constitutionality, the federal question, the
14 diversity and Rule 48(c), in Rally's mind, is more than a
15 compelling reason to hold that concurrent jurisdiction exists
16 and not simply exclusive jurisdiction exists. That Your
17 Honor's sale order says what it says but that the Arbitration
18 Act raises issues that need to be addressed. And it's
19 submitted by saying diversity exists but the sale order trumps
20 it, Your Honor, I would suggest that the district court in
21 California does have jurisdiction and does also have the
22 authority to hear these issues. And for those reasons, I think
23 the Court or Rally would be successful in arguing that it would
24 be successful on the merits on those four particular grounds.

25 I would state also, Your Honor, that the judicial

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1 estoppel argument is just fascinating to me. I -- you asked a
2 question of GM and it was your last question, I believe, which
3 was are you saying you could have gone to New York or
4 California but you decided to go to California. And they said
5 yes. And so, what they're basically saying is we can go to
6 California or New York but you can't. And that argument is, in
7 essence, saying we've waived subject matter jurisdiction by
8 entering into the wind-down agreements. And I don't believe
9 that's correct. And I believe if GM can go into New York and
10 California then Rally can go into New York and California. And
11 to simply say that we're -- our fortunes rise and fall here,
12 well, neither -- GM's fortunes didn't rise and fall here
13 either. They chose not to come here. And so I think we should
14 have that same right.

15 And for those reasons, Your Honor, we'd like a stay
16 of Your Honor's order until there is an appropriate order of
17 the district court.

18 THE COURT: All right. Mr. Steinberg?

19 MR. STEINBERG: Your Honor, in the context of the
20 order that you've indicated that you will enter, a stay pending
21 appeal makes no sense. And the whole oral argument that you
22 heard here before was really a reargument motion and was not a
23 stay pending appeal motion.

24 Your Honor has indicated that it was inappropriate
25 for them to go to California and to continue to prosecute the

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1 action in California. So if you're going to stay the entry of
2 the order, what does that mean as a practical matter? After
3 having ruled that it was improper to go to California, he now
4 is actually asking you to stay that order so he can go to
5 California? Which is 180 degrees of the relief you just
6 granted? This is not like he has a judgment and he wants to
7 stop us from enforcing the judgment because he wants to take
8 his appellate rights. I'm trying to collect on a monetary
9 judgment. This is started because he shouldn't have gone to
10 California in the first place. He shouldn't have violated the
11 wind-down agreement. He should have done -- he didn't have a
12 judicial right. And now he's asking Your Honor to stay it so
13 he can, in effect, do what he started to do which was the
14 reason why we brought the motion in the first place.

15 But I think he didn't answer your question what are
16 the four prongs for a stay pending appeal. He did talk about
17 the likelihood of success on the merits. And I don't think he
18 said anything today other than try to reargue what Your Honor
19 had just ruled upon as to the likelihood of success on the
20 merits.

21 Frankly, the other three grounds all, I think, favor
22 New General Motors. The harm to the appellant -- well, on the
23 surface, one could say he's harmed because the Chevrolet
24 dealership will be terminated on October 31st. The actual harm
25 is that he didn't have a judicial right and you're not

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1 depriving him of a judicial right. Conversely, the harm to
2 others being the appellee, which is New General Motors and the
3 new dealership, are dramatic if Your Honor's order is not
4 enforced. And Your Honor's opinion addressed the public
5 interest element which is the necessity of protecting buyers in
6 a Section 363 order and the Court's exclusive jurisdiction and
7 the public interest that's involved there.

8 I think the only other thing I would add, and it has
9 nothing to do with the stay pending appeal other than the
10 likelihood of success, I'll just point out that he wants to
11 refer to the complaint that was -- the petition that was filed
12 by Rally in California. On the corruption, fraud and undue
13 means by General Motors, that's just a label that he put on a
14 caption in a petition. He does not allege one thing about
15 fraud corruption in connection with the arbitration process.
16 He's saying that there were public statements made by Fritz
17 Henderson as to, in general, the importance of a dealership
18 network, and he's saying that that was misleading. But it has
19 nothing to do with actually what happened in the arbitration
20 and under the Dealer Arbitration Act. And as far as the
21 misconduct being beyond prec -- established precedent, if you
22 read the paragraph, what he's saying is that the award goes
23 beyond Section 747 because they believe that that statute,
24 which is absolutely silent on the issue, doesn't allow for the
25 assumption of one dealership -- the rejection of one dealership

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1 agreement and the assumption or the reinstatement for the other
2 three. That's the misconduct of going beyond what is
3 established precedent.

4 Your Honor's decision ruled that if you had to
5 address the merits, even though you weren't, you thought that
6 New GM and the arbitrator was right on that issue. So he can
7 point to a petition, which is based on the Federal Arbitration
8 Act, citing standards but have no application to the facts of
9 this case and then everything else on the standards for a stay
10 pending appeal warrant for the denial of the stay.

11 And he purposely didn't answer your question as to a
12 bond because, at this point in time, the bond -- we're not
13 looking for a bond. We're looking for the relief that we
14 brought our motion for. And a stay pending appeal is, in
15 effect, a denial of our motion which Your Honor just granted.

16 (Pause)

17 THE COURT: Stand by, everybody. Sit in place.

18 (Pause)

19 THE COURT: Gentlemen, in this supplemental
20 proceeding, Rally moves by oral motion, with my consent, for a
21 stay pending appeal. And I am granting its motion to the
22 extent of providing for a seven calendar day stay to permit
23 Rally to go to the district court in this district. And the
24 motion is otherwise denied. The following are the bases for my
25 exercise of discretion in this regard.

1 Though I have no memory of hearing it expressly
2 invoked, a motion of this character is governed by Federal Rule
3 of Bankruptcy Procedure 8005. It provides in relevant part
4 that "A motion for a stay of the judgment order or decree of a
5 bankruptcy judge for relief pending appeal must ordinarily be
6 presented to the bankruptcy judge in the first instance...A
7 motion for such relief" granted by -- "or for modification or
8 termination of relief granted by a bankruptcy judge may be made
9 to the district court but the motion shall show why the relief,
10 modification or termination was not obtained from the
11 bankruptcy judge. The district court...may condition the
12 relief it grants under this rule on the filing of a bond or
13 other appropriate security with the bankruptcy court."

14 As the language I just quoted makes clear, the rule
15 is not terribly helpful with respect to the standards for
16 considering a motion of that character. Rather, for that, we
17 look to the case law which, in the bankruptcy appellate arena,
18 takes a considerable amount of guidance from similar issues
19 presented under the FRAP, the Federal Rules of Appellate
20 Procedure.

21 I exercise my discretion in accordance with my
22 earlier decision, coincidentally in General Motors, at 409 B.R.
23 24, and the affirmants by Judge Kaplan of the district court in
24 2009 U.S. District Court Lexis 61279. As I stated in my ruling
25 there, in GM, the decision as to whether or not to grant the

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1 stay of an order pending appeal lies with the sound discretion
2 of the Court. See, for example, *In re Overmyer*, 53 B.R. at
3 955. Though the factors that must have to be satisfied have
4 been stated in slightly different ways and sometimes in a
5 different order, it's established that to get a stay pending
6 appeal under Rule 8005, a litigant must demonstrate it would
7 suffer irreparable injury if a stay were denied; there is a
8 substantial possibility, although less than a likelihood of
9 success on the merits of a movant's appeal; other parties would
10 suffer no substantial injury if the stay were granted; and that
11 the public interest favors a stay. See, for example,
12 *Hirschfeld v. Board of Elections*, 984 F.2d at page 39. It's a
13 decision of the Second Circuit in 1992; *In re DJK Residential*,
14 2008 U.S. Dist. LEXIS 19801; and 2008 WL 650389, a decision by
15 Judge Lynch back when he was a district judge; and *In re*
16 *Westpoint Stevens*, 2007 U.S. Dist. LEXIS 33725, 2007 WL
17 1346616, a decision by Judge Swain of the district court.

18 The burden on the movant is a "heavy one". See, for
19 example, *DJK* at *2. See also *U.S. v. Private Sanitation*
20 *Industrial Assoc.*, 44 F.3d 1082 at page 1084, another decision
21 of the Second Circuit. To be successful, the party must "show
22 satisfactory evidence of all four criteria". *In re Turner*, 207
23 B.R. at page 375, a decision of the former Second Circuit BAP
24 in 1997. Moreover, if the movant seeks the imposition of a
25 stay without a bond, the applicant has the burden of

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1 demonstrating why the Court should deviate from the ordinary
2 full security requirement. See DJK at *2, Westpoint Stevens at
3 *4.

4 While, as Judge Lynch noted in DJK, the Second
5 Circuit BAP has held that the failure to satisfy any prong of
6 the four-circuit test "will doom the motion," with Jerry Lynch
7 having cited Turner. The Circuit in more recent cases have
8 engaged in a balancing process with respect to the four factors
9 as opposed to adopting a rigid rule. In my earlier ruling in
10 GM, I assumed without deciding that the balancing approach
11 would be more appropriate. And I'm going to do likewise here.
12 I also note that when Judge Kaplan affirmed me in GM in the
13 decision that I described a few minutes ago, I think he took a
14 similar approach.

15 Let me start with injury first. Obviously, I take
16 the loss of a franchise seriously. And indeed, early in the
17 decision that I dictated -- I guess it's now an hour or an hour
18 and a half ago -- I did hopefully express my empathy to dealers
19 losing their franchises. However, what caused the lack of the
20 franchise, or the loss of the franchise, is not the ruling that
21 I issued tonight. It was the dealer termination agreement that
22 was entered into over a year ago. What we have here is
23 Congress recognizing the injury to dealers as a consequence of
24 either rejection of dealership agreements, as was the case in
25 Chrysler, or even the soft landing termination agreements that

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1 we had here, provided dealers with an arbitration remedy to, in
2 essence, undo that which otherwise would happen. And Rally
3 took advantage of that and it won in three-quarters -- or four-
4 fifths -- Pontiac, I guess, ultimately not being relevant -- of
5 the matters which it took before the arbitrator. Now, in
6 essence, what it's asking for is to avoid the injury from a
7 year ago and at the same time to avail itself of the benefits
8 of the arbitration to the extent that it won. With it having
9 won with respect to Buick, Cadillac and GMC, I don't think
10 there is irreparable injury to it by reason of its not having
11 shot the moon in its litigation efforts before the arbitrator.

12 Frankly, folks, I tried very hard to get it right.
13 And we're going to get to a likelihood of success in a minute.
14 But I do not believe that my ruling today causes irreparable
15 injury. And I think really all we're talking about is the
16 results of an arbitration system that was made available for
17 Rally and for which it only succeeded in part.

18 I will, however, assume that there is a -- at least a
19 peppercorn of irreparable injury. I'm certainly not going to
20 disqualify Rally for not showing more in the way of irreparable
21 injury. And I'm not, as I indicated, going to require it to
22 make a strong showing on all fours. I am going to take a
23 balancing approach so I'm going to turn to that next.

24 So let's talk then about likelihood of success which
25 is where Rally spent the bulk of its argument. Although we

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1 talk about likelihood of success, that's a shorthand for a more
2 nuanced analysis. The technical standard is there is a
3 substantial possibility although less than a likelihood of
4 success on the merits. Well, let's slice and dice the various
5 aspects of my earlier ruling.

6 First, the propriety of my conclusion that I do have
7 subject matter jurisdiction and that I have core
8 jurisdiction -- core, of course, not being the subject matter
9 jurisdiction issue but talking about the power of a bankruptcy
10 judge in contrast to a district judge to decide. Those two
11 rulings now seem to be accepted or at least unchallenged. And
12 although there was no express discussion of my decision not to
13 abstain, I didn't hear any argument on that. And, frankly,
14 discretionary abstention is called discretionary for a reason.
15 There would have to be an abusive discretion in my electing not
16 to abstain. And I think that there would not be a material
17 likelihood of success on that and would be far short of a
18 substantial possibility.

19 On the merits, it's undisputed that we're not talking
20 about the Federal Arbitration Act, that the Dealer Arbitration
21 Act provides no right to appeal. And my ruling did not go so
22 far as to say that under no circumstances under anything that
23 might ever be alleged would I deny the right to appeal. What I
24 have said is that to the extent, if any, to which there would
25 be such a right, a construction to, in essence, save the

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1 constitutionality of the statute if it were otherwise put in
2 question, there would have to be something seriously wrong with
3 the arbitration in the way of fraud, corruption, bribery being
4 a species of corruption, or, and I articulated it differently,
5 disregard of applicable authority. I went on to provide two
6 additional levels -- you can call it dictum; you can call it
7 alternative grounds, whatever, which caused me to believe that
8 it's not likely that there's going to be a reversal.

9 And as far as whether there's a substantial
10 possibility, on the facts that were put before me, I don't
11 think there's even that. To be sure, words were put before the
12 district judge triggering responses that if this were an action
13 under the Federal Arbitration Act would get a judge's
14 attention. But as the recent decisions by the Supreme Court in
15 Bell Atlantic v. Twombly and, especially, Ashcroft v. Iqbal
16 tell us, just invoking words making conclusory allegations in a
17 pleading isn't enough. You can't talk about corruption without
18 giving the Court some facts as to lead the Court to believe
19 there was corruption. And we're not talking about corruption
20 by GM. We're talking about corruption by the arbitrator. I
21 used the example before of taking bribes. There are no
22 allegations of ex parte communication. There are no
23 allegations of any irregularities in the proceedings before the
24 arbitrator other than the assertion that, as a matter of law,
25 the arbitrator got it wrong. And even then, there's no

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1 allegation that the arbitrator disregarded any particular case
2 that would suggest to the arbitrator that he got it wrong. So
3 while I think there would be a substantial possibility of
4 success on appeal if I were somehow to rule that there is no
5 right to appeal and that I got to close my eyes to
6 irregularities of the type that I just described if they were
7 shown, it doesn't affect the outcome here because I don't have
8 any facts suggesting any of those things. Bottom line, folks,
9 I do not find a substantial possibility.

10 Third factor. Other parties would suffer no
11 substantial injury if the stay were granted. And here, I think
12 there are potential injuries, at least if we go past October
13 31st, of one type, for sure, and another which more properly
14 may be regarded as being a public interest concern rather than
15 a private prejudice. For GM's benefit, I'll say that I see no
16 prejudice in staying for five days to allow the district court
17 to second guess me on the stay application. And for that
18 reason, I am going to grant a stay to the extent of five days.

19 But we have a new dealer who's taking over on the
20 31st of October. I don't have evidence on it, but I got to
21 assume that the existing franchisee's gain is going to be the
22 new one's loss. They're either going to be competing with each
23 other or that other guy is going to be made to wait if this
24 thing can't proceed past October -- if this somehow proceeds
25 past October 31st. And we have a nationwide program which was

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1 judicially blessed back in July of last year for these dealer
2 unwinds and I think it's prejudicial to New GM to put this
3 system in play to any greater extent than Congress did by its
4 statutory enactment. And Congress didn't say everything you're
5 doing is undone. What it did was say well, we're going to set
6 up this arbitration mechanism. And that's exactly what we got.
7 And it goes without saying that I comply with the congressional
8 but I don't think we should be going beyond what Congress said.

9 Lastly, the public interest favors a stay. That's
10 the final factor. While I quoted the language before, and I
11 think Rally acknowledged its importance, that we deliver to the
12 purchasers of assets in bankruptcy sales that which we have
13 promised. And if and to the extent that the counterparty to a
14 deal with an estate comes back and says I need you to enforce
15 it so I get the benefit of what I had bargained for, we do
16 that.

17 I talked back at the time of the original 363
18 determination and my separate ruling on the stay application
19 that followed my 363 ruling by a couple of days about how
20 important GM's survival is to the public interest and the
21 interest not just of the federal taxpayers but the needs and
22 concerns of the states of Michigan and Ohio and the communities
23 in which GM plants operate. We made decisions then about that
24 which was necessary to give New GM the maximum opportunity to
25 thrive. We made rulings then which are res judicata. I don't

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1 think the public interest is served by interfering with what we
2 then put in place in any way.

3 Certainly, there is no public interest in allowing
4 this collateral attack. It's a private interest to the extent
5 it's any interest. And when a party that was offered and
6 availed itself the opportunity to arbitrate then wishes to take
7 the portion for which it did not win and put the earlier system
8 in play beyond getting the arbitration opportunity for which
9 Congress provided, that is, at the least, not in the public
10 interest and may fairly be regarded as being contrary to the
11 public interest. At best, looking at it most favorably to
12 Rally, it is a wash because it is private interests that are
13 being sought to be advanced and not public ones.

14 So, as my discussion indicates, folks, I think we got
15 to go by the book and deal with it as I did in my decision
16 dictated just a moment ago by the four enumerated factors
17 articulated in the case law for the grant of a stay. And it is
18 stayed to permit a second opportunity to go to the district
19 court for those seven calendar days. And so as not to put a
20 gun to the head of the district court having to issue a
21 decision, like Judge Kaplan did where he had to work all night
22 on it, I don't want to do that to the district court again if I
23 can avoid it.

24 But beyond that, it is denied. Rally is authorized
25 and requested, not ordered, but requested to advise the

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1 district court that an application was made to the bankruptcy
2 court, that the bankruptcy court denied it except to the extent
3 of the five days for the reasons that it dictated into the
4 record and that any further application to the bankruptcy court
5 is dispensed with and waived. From now on, we're in the
6 district court, folks.

7 Yes, sir?

8 MR. STEINBERG: Your Honor, I just have some brief
9 moments and I thank you for staying so late for today. In your
10 presentation in connection with the stay pending appeal, you
11 said seven calendar days but I believe you also said at one
12 point in time five days. So --

13 THE COURT: If I did, it was a reference to five
14 business days. Seven calendar days transposes into five --

15 MR. STEINBERG: Okay.

16 THE COURT: -- business days. And ever since we
17 amended the federal rules of many different types last
18 December, we now go on bunches of seven calendar days.

19 MR. STEINBERG: The second thing, Your Honor, is that
20 while I'm not exactly sure what I would have otherwise done
21 during the seven calendar day period because the wind-down
22 agreement is fairly passive, I do want to make sure that I'm
23 still able to present to Your Honor the order that you had
24 asked for --

25 THE COURT: Of course you can.

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1 MR. STEINBERG: Okay. And I think that's it. I
2 understand that the only activity that will happen from this
3 point on is in the district court of this district.

4 THE COURT: Correct. All right. It's been a long
5 day. Good evening, gentlemen. We're adjourned.

6 (Whereupon these proceedings were concluded at 7:23 p.m.)

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2 I N D E X

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4 R U L I N G S

	DESCRIPTION	PAGE	LINE
6	Motion of New GM for an order enjoining Rally	41	8
7	Dealership from interfering with New GM's		
8	ability to reform its dealership platform,		
9	from vacating or modifying an arbitration		
10	decision and from pursuing that effort in		
11	California district court granted		
12	Court declines to exercise its discretionary	50	12
13	abstention		
14	Oral motion by Rally Auto for a stay pending	71	21
15	appeal granted for five business days to permit		
16	Rally to go to district court;		
17	but denied in all other respects	71	24
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2 C E R T I F I C A T I O N

3

4 I, Lisa Bar-Leib, certify that the foregoing transcript is a
5 true and accurate record of the proceedings.

6

7 _____

8 LISA BAR-LEIB

9 AAERT Certified Electronic Transcriber (CET**D-486)

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16 Date: October 6, 2010

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